

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HAGER DA SILVA,

Plaintiff,

v.

NEW YORK CITY TRANSIT
AUTHORITY, et al.,

Defendants.

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* Case No. 17-CV-4550 (FB)

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* Brooklyn, New York

* March 28, 2018

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TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE VERA M. SCANLON
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff:

DAVID ALAN ROTH, ESQ.
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For the Defendants:

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1 (Proceedings commenced at 4:25 p.m.)

2 THE COURT: Harger Da Silva versus New York City
3 Transit Authority, et al., 17-CV-4550. So for the plaintiff?

4 MR. ROTH: David Roth, from Roth and Roth, Your
5 Honor, and my associate Elliot Shields, also from Roth and
6 Roth.

7 THE COURT: Mr. Shields, did you file a notice of
8 appearance?

9 MR. SHIELDS: I have not yet, Your Honor.

10 THE COURT: Okay. You should do that.

11 MR. SHIELDS: Yes, I will.

12 THE COURT: All right. For defendants, yes.

13 MR. YAGERMAN: Good afternoon, Your Honor.

14 Mark Yagerman, Smith Mazure Director Wilkins Young
15 and Yagerman, for New York City Transit Authority and my
16 associate, Marcia Raicus. We both filed appearances. We just
17 came into the case some time early of last month. And Denise
18 Rozza is in house with New York City Transit Authority. She
19 previously was handling the case.

20 THE COURT: All right. How do you spell your name,
21 your last name?

22 MS. FURIANO ROZZA: Furiano Rozza, F-U-R-I-A-N-O and
23 Rozza, R-O-Z-Z-A.

24 THE COURT: Okay. This is one of my law school
25 interns, law students and interns in the courthouse. All

1 right.

2 So for my benefit, for his benefit, for my deputy's
3 benefit, I know you went through some of this before with
4 regard to my colleague, but the case was transferred to me.

5 So before we dive deep -- you're standing up, you
6 can have a seat -- before we dive deeply into your discovery
7 issues, do you want to just orient me with regard to your
8 respective positions, so --

9 MR. ROTH: Do you want me to stand, Your Honor?

10 THE COURT: No, it's fine. You can stay seated.
11 Just use the microphone.

12 MR. ROTH: So this is a case where my client, Ms.
13 Harger Da Silva, is a 19 year old architectural student from
14 Brazil visiting her boyfriend in America.

15 And she's -- it's the Summer of 2016, she's waiting
16 at the platform and she faints and slides into the subway
17 tracks at Barkley subway station.

18 The train comes in, amputates her arm and her leg
19 above the knee, above the elbow. I've been litigating against
20 the transit authority for many, many, many years and one of
21 the things that happens is --

22 THE COURT: Your colleague is shaking he head over
23 there.

24 MR. ROTH: So anyway -- so one of the things that
25 has caught our attention is the statistics that the transit

1 authority keeps and the way in which they decided to design
2 and maintain their subway system.

3 So our claims here are, one, which we don't have, we
4 just got information, is did the train operator have the
5 opportunity to stop and was he negligent in failing to stop in
6 time.

7 The train operator, from the documents that they've
8 given us, has not given a statement, but he says he sees her
9 faint and didn't have time to stop and he threw it in as soon
10 as possible.

11 The other -- we actually have two other claims, but
12 the main claim is that the Transit Authority has chosen not to
13 put up platformage doors or some kind of edge protection to
14 stop people from falling into the subway system, into the
15 tracks.

16 What happens is that over the years in other cases
17 which I've had experience, that the Transit Authority has
18 asserted immunity defenses and in state court they asserted
19 immunity defenses after verdict and then the appellate
20 division will throw a case out all the way after trial because
21 of --

22 THE COURT: And this is all in general about
23 immunity --

24 MR. ROTH: Yes.

25 THE COURT: -- or just about this barrier issue?

1 MR. ROTH: Well this is not the -- no, this is not -
2 - the cases that I'm talking about actually, the gap cases
3 which they no longer get immunity for because we found that
4 the study that they did was no study at all.

5 So -- but for years and years and years until we
6 fought, fought, fought to get the actual document that they
7 relied on for their policy, they allowed all of a sudden
8 having dismissed, dismissed, dismissed cases all of a sudden
9 after I was able to obtain a document that said, I think six
10 inches is a good idea with no measurement, no study, they
11 starting losing that.

12 So the immunity discovery is extremely important to
13 say, what's your basis for not putting them up, and you know -
14 -

15 THE COURT: But what about a different question
16 which is why is it that this is the standard of care that you
17 think is industry appropriate, New York City appropriate,
18 where does this come from?

19 MR. ROTH: Well, where it comes from is that in many
20 other stations across the world that they have these edge
21 doors, okay --

22 THE COURT: Less than a 100 year old system, since
23 what I could gather from this --

24 MR. ROTH: Okay. And what I'll say is that there's
25 a -- the various immunity statutes all say that you're allowed

1 to have a design, and you can make your decision, and you can
2 do whatever you want, but once you begin to realize and once
3 people start to die and once people start to get hurt, say you
4 know what, you can't just say, hey, we have a safe design.

5 So if you're going to rely on -- and they said, you
6 know, in their letter to you, they wrote that it's been 100
7 years old and if you can say, okay, we're not supposed to make
8 any safety improvements in 100 years, and --

9 THE COURT: I mean, but it's obvious what they're
10 saying. They're saying retrofitting 400 plus stations with
11 guides given the size, shape, distance, et cetera, this is
12 completely impractical. They can barely manage to keep up
13 with the maintenance of the system, let alone do the kind of
14 retrofit that you're talking about.

15 MR. ROTH: So there's a choice -- there's choices
16 that they have and I'm -- if this was a motion for summary
17 judgment on the immunity and I would have all of the
18 information, I'd be able to show you that the choices that
19 they made and that I have some --

20 THE COURT: I know, but where do you get the
21 industry standard? I mean, there's going to be the basics
22 that are, you know, necessary. So lighting, I mean, maybe no-
23 slip surfaces, et cetera and then there's going to be above
24 and beyond. So where does it come from that this is the
25 standard for negligence?

1 MR. ROTH: So there's many other stations across the
2 world and in the United States of America that do have the
3 platform edge doors, okay.

4 THE COURT: Well, what about retro --

5 MR. ROTH: Well, all that's again, so when you say
6 retrofit, okay, when you say retro --

7 THE COURT: I mean is there a better word?

8 MR. ROTH: No, no, no, no. So what I'm saying is
9 right this second, they're installing platform edge doors in
10 the L train. They have known about this and according to
11 their own documents, for years and years and years. They
12 built -- hold on -- okay, sorry.

13 THE COURT: Yeah, but this, so where do you -- no,
14 you hold on. Where does the standard come from because there
15 is a difference between negligence and what one might like if
16 you could have everything you wanted in a system.

17 MR. ROTH: So the difference between a lot of the
18 other immunities that cases what they have where there's a
19 standard, not standard, if you have a design and there's a fix
20 that could be -- and you choose not to do that fix, as Mr.
21 Yagerman said in the last conference, he says there's
22 executive decision making, there's costs, there's all this
23 other stuff, and if they're entitled to their immunity, they
24 will get their -- they will win.

25 THE COURT: So what are they -- what --

1 MR. ROTH: And what I'm saying is that once you know
2 that to a moral certainty that if you install a safety device,
3 nobody will -- that there will be no more amputations, there -
4 -

5 THE COURT: Well, what you don't know is whether
6 there would be other problems.

7 I mean you'd have to design it for each -- I'm going
8 out on a limb here, but you have to design it for each
9 station.

10 So you wouldn't be able to change the length of the
11 cars, you wouldn't be able to use different cars on a
12 particular line, you might have overcrowd -- you know, et
13 cetera, et cetera, et cetera.

14 Plus, I can't even imagine how many zeros are on the
15 end of the -- adding these barriers to the stations. I mean,
16 you probably could just take the L line, if you're saying
17 they're putting it in there and multiply that by however many
18 stations there are.

19 MR. ROTH: So at the monorail in Disney World
20 there's a four foot high chain link fence that runs the length
21 of it. They had to shuttle in -- I don't know if you get the
22 shuttle at Times Square -- they have a red railing that runs
23 along there. The fact that they --

24 THE COURT: Yeah, that's extremely crowded and -- I
25 don't -- I wonder if that's the best way.

1 MR. ROTH: Well, all I'm saying is that --

2 THE COURT: But anyway, that's personal experience.
3 I'm not the witness.

4 MR. ROTH: Right, right. So what I'm saying is that
5 there's many options and I think that, you know, depending on
6 what they say because, you know, they have their own customer
7 contact with train report, they have --

8 THE COURT: But is it called customer --

9 MR. ROTH: Yes. It says customer contact with train
10 --

11 THE COURT: Oh, meaning customers who have -- who
12 are hit by the train.

13 MR. ROTH: Right. And you can -- and actually I
14 gave this to the defendants so that they could kind of see it.

15 They say that in the last -- it's in my letter,
16 there's I think 522 deaths, 1,600 amputations, there was
17 serious injuries that they have recorded and what I'm saying
18 is, is that -- so the theory that they're espousing is we're
19 too big to be safe. Okay.

20 And that they say that there's budgetary concerns
21 and there's all this other stuff. If they're entitled to
22 those immunities, and I said to them at the last conference
23 and even beforehand, I said, you know, that if you're going to
24 declare these immunities, you have the burden of proof on the
25 immunities and that's going to be a big burden and if it comes

1 out that after all of the discovery comes out in the immunity
2 that you're entitled, then you win.

3 And if you're not entitled to it and say, wait a
4 minute, you know, wow, based on the case law if you know that
5 all these people are hurt and there's some options that are
6 available and you just chose not to do it, you chose not to
7 make it safer, then maybe you don't get the immunity and maybe
8 it goes to a jury, then the rest of the pressure of the
9 discovery on the case would be, you know, would be changed.
10 So all --

11 THE COURT: But are you arguing that there should be
12 -- so that -- there is -- I'm trying to think of the last
13 airport I was in that had this --

14 MR. ROTH: Yes.

15 THE COURT: -- in -- I don't know where it was, I'm
16 trying to think where I went -- one of the air trains --

17 MR. ROTH: JFK.

18 THE COURT: -- but yeah, that they -- you're saying
19 they should have that or they should have those red bars that
20 they have at the shuttle?

21 MR. ROTH: I'm saying is that there's a whole bunch
22 of options available to them. I don't know what they studied,
23 I don't know what cost analysis they made, I --

24 THE COURT: All right. So then you're saying every
25 single safe -- and I don't understand what their relationship

1 is between the city -- where you're saying the city needs to
2 or the transit needs to consider a particular safety
3 improvement. How are you fitting that standard, right?

4 And presumably around the world there have been
5 safety improvements in how one builds a subway system and you
6 could keep saying that that's the standard, but you know,
7 which they should -- the Transit should meet.

8 It doesn't really seem that likely or practical, so
9 you know, how is the -- how does one figure out what the
10 standard of care is here for your negligence claim?

11 MR. ROTH: So what I'm saying is that when they're
12 aware of the people getting injured in certain situations and
13 that they're depending -- that for them to get immunity or the
14 different types -- there will be different types of immunity
15 they're asserting, for them to get immunity they have to do a
16 study to say that this is -- and then they have to rely on
17 that study and it has to be an adequate study --

18 THE COURT: That -- I think it's a different -- I'm
19 asking you what's the standard of care?

20 This would be your case, you would have to show -- I
21 mean, I know you had this discussion about immunity, but you
22 have to show there's a breach of a standard of care. So where
23 does the standard of care come from?

24 MR. ROTH: The standard of care comes from that you
25 want to keep people safe and you're a common carrier. You

1 have a non-delegable duty to keep your premises safe.

2 If you know to a moral certainty that hundreds, if
3 not thousands -- I don't know how long they've kept records --
4 thousands of people are dying and you're making different
5 choices of how to, you know, how to spend your money --

6 THE COURT: Yeah, but I mean -- okay. Now to get a
7 little bit in the weeds, thousands of people are dying. Well,
8 from what I can tell from my informal contacts with people who
9 work in the police, it's pretty much a person a day jumps in
10 front of a subway car.

11 Well that person went onto the tracks and I'm not
12 sure if they could have done all that much about that, but
13 your client apparently fainted and fell on the tracks.

14 So you know, you're talking about a report that
15 talks about -- I think you're talking about a report that says
16 all contacts with the subway, right? So how did this get
17 separated out so that you could tell what risk would be dealt
18 with?

19 Now maybe if you close off the ends of the platform,
20 you can stop the jumpers, I don't know. But, you know, again,
21 what number here, you know, because it's dramatic to say
22 thousands of people are dying and they've known this for years
23 and then you say, well what's really going on here and again,
24 who -- where does this standard of care come from? Like
25 apples and oranges, what are we really talking about here?

1 MR. ROTH: So you're saying is -- so is your
2 question to me, why are they -- like let's assume there's no
3 immunity, just generally why are they negligent?

4 THE COURT: Yeah, just what's this case about,
5 what's your theory of negligence here?

6 MR. ROTH: I'm saying if they were not entitled to
7 immunity, I think that I could go to the jury and say that the
8 Transit Authority was aware that they had a system and that
9 they made choices and that they chose not to have a safe
10 subway system.

11 That maybe that the Transit Authority because of the
12 way it's constructed, maybe certain stations are very crowded,
13 maybe that there's a lot of different things that they're
14 doing which -- and they've done studies now, how come they're
15 starting to put the doors in the L train? I don't know.
16 Maybe they've had other proposals, I don't know.

17 So all I can say is that that discovery -- and I
18 don't think if you think I'm coming before you and saying, oh,
19 I think this is the easiest case in the world, I am certainly
20 not by any means.

21 THE COURT: No. And what I would do if -- and I
22 don't think this should be an examination of a capital
23 investment decisions made by the Transit Authority across the
24 board.

25 So I'm trying to figure out what exactly your theory

1 is, how you see what the immunity issue is and then talk about
2 discovery. Because from the letters that I've read, you have
3 some seemingly intense dispute about what should be turned
4 over with initial disclosures. But it would be helpful for me
5 to understand the case. All right. So --

6 MR. ROTH: Oh, Your Honor, there's no -- we're not
7 disputing it. I mean, I don't think that we're disputing it,
8 I said whatever documents you're going to rely on for your
9 immunity and all I said was, at the initial conference was,
10 listen, it's going to take you a long time and if you -- you
11 know, and that we should focus on that and whatever you need
12 to get that because otherwise you'll blow every deadline that
13 we have.

14 THE COURT: I don't see how they're going to -- that
15 part, that's what I don't understand here, but --

16 MR. ROTH: Well, they had initial disclosures that
17 they say they want to give us discovery and they can't make
18 it.

19 THE COURT: Yeah, but so my understanding, and I'll
20 hear from defendant's counsel, is that initial disclosures are
21 at the time when you evaluate the case, well who do you know
22 would be witnesses and what kinds of documents do you have.

23 You don't need to produce all the documents, I mean
24 you may want to tee this up for an early motion, et cetera, et
25 cetera, so I'll hear for one second, but I don't see given

1 even the production, which did not need to be filed, the
2 docket seems to be off to a good start.

3 But anyway, what's the defendant's view of what's
4 going on here and how you think this issue of immunities or
5 other issues should be brought to the fore of the case?

6 MR. YAGERMAN: Thank you, Judge. And I did -- I
7 provided our complete investigative file --

8 THE COURT: For the incident itself?

9 MR. YAGERMAN: -- but -- for the incident itself.

10 THE COURT: I get it. Maybe I should go back to the
11 plaintiff. What's the theory that the operator was negligent?

12 MR. ROTH: Did he have time to stop before --

13 MR. YAGERMAN: She, it was a she.

14 MR. ROTH: Did she have the --

15 THE COURT: She -- how is that negligent --

16 MR. ROTH: If you're on the track and you can see it
17 and then you're not paying attention, that's why there's an
18 operator and you can run somebody over. There's many, many
19 cases where somebody if they have the opportunity to stop and
20 they don't stop, but then they're negligent.

21 That's why there's an operator. It's a
22 straightforward -- it's called a 12-9 case, they have tons of
23 them. Many they win, many they lose.

24 THE COURT: And there's some evidence in this case
25 that there was time to stop from when she fainted onto the

1 track?

2 MR. YAGERMAN: I don't believe so, but -- I don't
3 believe so.

4 THE COURT: Okay. All right, so let's --

5 MR. YAGERMAN: I think there was an emergency that
6 existed and the train operator brought the train to the stop
7 as quick as she could have and couldn't avoid the accident.

8 Basically that's -- but regarding Mr. Roth's, you
9 know, proposition, I have found not one case, reported case,
10 establishing a duty of care to provide, you know, barrier
11 guards or intrusive devices on platforms. There's none. In
12 fact --

13 THE COURT: None, none in New York, none around the
14 country, none --

15 MR. YAGERMAN: None in New York --

16 THE COURT: Okay.

17 MR. YAGERMAN: -- at the very least. In the
18 country, there are no subway systems --

19 THE COURT: As old --

20 MR. YAGERMAN: -- that has --

21 THE COURT: -- or as big.

22 MR. YAGERMAN: -- barrier guards in this country --

23 THE COURT: Is there other --

24 MR. YAGERMAN: -- other than, you know, the limited,
25 you know, trolley systems --

1 THE COURT: Disney.

2 MR. YAGERMAN: -- like at JFK or whatever.

3 THE COURT: Okay.

4 MR. YAGERMAN: In fact foreign countries, Paris, I
5 think there were --

6 THE COURT: Paris. I feel like -- I'm trying to
7 remember, I know there was somewhere --

8 MR. YAGERMAN: There's only like three lines that
9 have barrier guards on the Paris line out of many, many lines
10 that they have. And in Britain, I think in London, they have
11 only two or three as well out of the many lines that they
12 have. Shanghai as well and South Korea, the whole system is
13 not covered by barrier guards.

14 THE COURT: All right. So your point would be
15 they're going to lose on this idea, the duty of care because
16 the both domestic and international standard for --

17 MR. YAGERMAN: Exactly.

18 THE COURT: -- for subway stations does not include
19 a barrier guard. All right.

20 MR. YAGERMAN: Exactly.

21 THE COURT: What about the -- how do you look at the
22 immunity issue?

23 MR. YAGERMAN: Well the way I look at it, Your
24 Honor, is that, you know, the Transit Authority is always
25 trying to explore different ways to improve service and safety

1 on the system.

2 And, you know, the Transit Authority, you know, back
3 probably in 2013, you know, came out with a paper that said,
4 you know, we're going to warn passengers not to stand by the
5 edge --

6 THE COURT: Right, stand away from --

7 MR. YAGERMAN: -- to get -- stand away --

8 THE COURT: -- stand away, behind the yellow line,
9 behind the --

10 MR. YAGERMAN: Exactly.

11 THE COURT: -- the bumps for the --

12 MR. YAGERMAN: You know, a whole education campaign
13 with placards and announcements and personnel wearing buttons
14 and, you know, when you buy your token -- not your token, your
15 metro card --

16 THE COURT: If you --

17 MR. YAGERMAN: I'm dating myself, Judge. And I
18 started at the TA in 1979, so I remember tokens.

19 THE COURT: The little token with a Y.

20 MR. YAGERMAN: But -- and in the interim while we're
21 warning, we're making plans to see what kind of prototypes we
22 can have on different stations like the Canarsie line.
23 They've picked out three lines on the Canarsie line while the
24 station is closed because --

25 THE COURT: Three stations on the Canarsie line?

1 MR. YAGERMAN: -- while the line is closed, the
2 construction is being done like 2019, 2020, to see what kind
3 of prototypes we can do on some type of barrier system at
4 Canarsie on the yellow line. They picked out three stations
5 that they're trying to figure out compatibility.

6 There are -- you kind of hit it on the head, Your
7 Honor. There are so many limitations and challenges to
8 putting barrier guards or intrusive devices, detection devices
9 on a hundred year old system.

10 Each station out of the 472 stations, and 665 miles
11 of track, covering each of the counties and the city,
12 including Staten Island (indiscernible), has limitation.

13 Just look at, you know, down here at Court Street,
14 you know, there are columns that support the roof of the
15 underground, you know.

16 The devices that he is talking about to retrofit,
17 you'd have to take away all those columns. I mean the
18 electricity, the -- each station is unique. The curvature
19 that runs with particular streets --

20 THE COURT: Okay. So you're talking about whether
21 and how it can be done. One question that plaintiff is
22 raising, I think, is you could have the fancy kind that you
23 have at the airport, or you could have what is at 42nd Street
24 for the shuttle at Times Square, those red bars and everybody
25 has to stand around and wait until everybody gets off and then

1 you get on and so --

2 MR. YAGERMAN: Again, that has limitations as well.
3 There has to be, you know, safety considerations, whether it
4 could mesh with -- let's take this particular station, the
5 Atlantic Avenue Station.

6 Can he tell us that that could do it in the Atlantic
7 Avenue -- no one, no. We don't know if it's feasible or not.
8 I mean, whether there's, you know, safety considerations for
9 that particular station.

10 THE COURT: All right. So, just so I understand --

11 MR. YAGERMAN: And whether it's safety or
12 compliance.

13 THE COURT: So you have the issue of you believe the
14 domestic and international standard of care does not require
15 this kind of installation.

16 MR. YAGERMAN: Correct.

17 THE COURT: How does the question about the
18 executive branch being allowed to, in a responsible way, have
19 priorities as to spending? I mean, we're all here.

20 MR. YAGERMAN: Absolutely.

21 THE COURT: I have to say, I sometimes, you know,
22 sometimes ride the subway -- the *New York Times* did its whole
23 report and it would seem like terrorism and signal failures
24 are going to be pretty high on your list of things that you
25 need to deal with.

1 And while, obviously, what happens here and whatever
2 the number turns out to be, people were hurt by contact with
3 the train, seeing your position Is we can decide which are the
4 most serious and most widespread problems that need to be
5 dealt with in order to keep the system running.

6 MR. YAGERMAN: Exactly.

7 THE COURT: So how does that --

8 MR. YAGERMAN: -- It doesn't have to be the best --

9 THE COURT: -- idea fit in --

10 MR. YAGERMAN: -- decision, Your Honor, it has to be
11 a rational decision.

12 THE COURT: Right. So how does that idea fit in
13 with this case and arguments that you're going to raise?

14 MR. YAGERMAN: Well, it fits within the argument
15 that as an executive body making decisions about where money
16 is spent and whether you have money to spend, there are
17 priorities. And whether --

18 THE COURT: And you're saying give -- you have the
19 right to make those decisions?

20 MR. YAGERMAN: Exactly, 100 percent.

21 THE COURT: All right. So in terms of the process,
22 I mean, it seems like, just again looking at your letters
23 here, you're talking about exchanging a lot of information,
24 but I'm not sure where you were going with procedurally how
25 this would be resolved.

1 Because on the one hand, plaintiff, you're making
2 the point, while you ultimately thwarted one effort of
3 claiming immunity, what you don't want to have is litigate
4 this whole case and then find out at the end that there's an
5 immunity and it's a waste of everybody's time and your
6 client's hopes and your money, et cetera, et cetera.

7 MR. ROTH: That's correct.

8 THE COURT: On the other hand, at least the letter
9 that's on the docket at 30, you know, it talks about the
10 plaintiff and all of the plaintiff's issues, including her
11 health care in Brazil.

12 So that suggests you're talking about doing most of
13 the discovery. I mean, unless you're talking about settling,
14 it seems like plaintiff's situation is really the second part
15 -- maybe the third part of this, immunity, liability, damages.
16 So --

17 MR. YAGERMAN: Well, there is an issue with getting
18 records from Brazil and being able to defend the case on that
19 score, and whether we've received proper authorizations to
20 release those records.

21 THE COURT: Well, what -- I'm sorry, I have question
22 sort of prior to that. Are you trying to do all the
23 discoveries so that there's one global motion or -- and this
24 is really trying to me catch up with what's --

25 MR. YAGERMAN: What I would have like to do, Judge -

1 -

2 THE COURT: -- going on with Judge Pollak.

3 MR. YAGERMAN: What I'd like to do is try and do the
4 initial fact discovery first and get to the immunity issue at
5 some point after we've done the fact discovery.

6 THE COURT: What's the theory being, you might
7 settle or --

8 MR. YAGERMAN: Well, I think --

9 THE COURT: -- I guess I'm unclear, why do you care
10 about the plaintiff's damages if --

11 MR. YAGERMAN: Because there's immunity issue -- the
12 issue relating to the barrier guards and technology can be
13 dealt with on a motion, and I feel that at some point in time,
14 the court would schedule a time to --

15 THE COURT: Correct. So maybe I'm asking it
16 unclear, but it seems to me you want to raise an immunity
17 question, you want -- and generally try to deal with
18 immunities early, so you're trying to have this -- varying
19 descriptions of your letters, but limited discovery, although
20 it's about, it's only limited in the sense about the topic,
21 not limited in the sense that there's a lot of paper it seems
22 like it. But there's the immunity issue and there's the
23 event, I mean --

24 MR. ROTH: The event, that's a --

25 MR. YAGERMAN: The event -- the events I have I --

1 you know, is something that we can deal with kind of readily.

2 THE COURT: Okay.

3 MR. YAGERMAN: The immunity issue is accumulating
4 the decision-makers, so to speak, so I can get them to the
5 court in a very clean manner.

6 THE COURT: But my question is, do you want to have
7 --

8 MR. YAGERMAN: It takes time for me.

9 THE COURT: -- do you -- are you trying to have a
10 global summary judgment motion that's -- puts all three of
11 these issues before the court or at least the two, one is the
12 immunity and the second is the alleged negligence and I guess
13 there's some overlap to the extent that even plaintiff's
14 proposal that could have saved the plaintiff from these
15 injuries.

16 I don't know -- hypothetically maybe those big glass
17 doors that you're talking about from the airport would, but
18 the, you know, the red, I don't know, whatever they are --

19 MR. ROTH: Railing?

20 THE COURT: -- steel poles, railings, that are --

21 MR. ROTH: Well, there's, I'm just saying there's
22 choices, I wasn't saying those specific --

23 THE COURT: -- I mean, but the choices -- well but
24 the point is given what happened to her, would it have made a
25 difference?

1 MR. ROTH: The red pole would have.

2 MR. YAGERMAN: No.

3 THE COURT: They probably wouldn't have caught her.

4 MR. ROTH: Excuse me, Your Honor, I mean my son just
5 went to Japan. He knows -- he's 17 years old. He knows what
6 we talk about is this, and he took like ten pictures of a four
7 foot high barrier in Japan in every single subway system. So
8 I mean, there's all different variations and it only came up
9 four feet high --

10 THE COURT: Yeah, but my only --

11 MR. YAGERMAN: She could have fell right over that.

12 THE COURT: Okay.

13 MR. ROTH: No, she fainted, why are you saying that?

14 THE COURT: My point is only it may be -- there's
15 one view in which the immunity -- the pure question of whether
16 any determinations about capital expenditures of the scope
17 that the plaintiff is talking about are subject to immunity
18 that would -- may need to be free standing, and the subject
19 of a motion.

20 Another view is, you need to hone what exactly the
21 plaintiff is looking for and in order to focus on that, you
22 need to know what exactly happened to the plaintiff because
23 maybe the barrier idea really makes no sense if -- considering
24 how she fell, et cetera. I don't know.

25 And then the third question is, do you need to do

1 the damages discovery before you resolve part one and two, but
2 if, for example, you're going to depose the plaintiff, then
3 maybe you might as well do it all at once, even if you
4 essentially reserve the damages issue until later. Trying to
5 get a handle here on what -- how you see this being brought to
6 a head

7 MR. ROTH: Yes, Your Honor. I have -- this is what
8 my initial proposal was and I still think it fits in with
9 everything you're saying. The plaintiff and her boyfriend
10 were on the tracks. They should be deposed, preserve their
11 memories so that, you know, we're ready to produce them, you
12 know, as --

13 THE COURT: Is he still in New York or he's in
14 Brazil?

15 MR. ROTH: No she's in Brazil.

16 THE COURT: She's in Brazil, what about him?

17 MR. ROTH: She's in Brazil.

18 THE COURT: Where's the boyfriend?

19 MR. ROTH: The boyfriend, I believe, is in New York,
20 I believe. I -- okay.

21 THE COURT: He was a student as well?

22 MR. ROTH: Yeah. I don't think so.

23 THE COURT: All right, but he's in New York.

24 MR. ROTH: Right. He's in New York and they just
25 gave us a whole bunch of fact discovery and the -- there's a

1 train operator, there's a conductor who might be there and
2 then their records identify two eye witnesses, I believe, that
3 were on the platform.

4 That discovery, I think, should -- and I don't think
5 there's anything stopping it, there's no -- there's nothing --
6 there's no reason to stop that from going forward.

7 My client is going to -- she's a double amputee, she
8 has -- I think she just graduated from architectural school,
9 so her damages, whatever they are as far as physically, are
10 going to be developing, you know.

11 We're doing some research into -- they have a
12 robotic arm which you can control from your brain that they're
13 working on and she might be a candidate to participate in
14 that. But that's going to be down the road.

15 I think that what I also did, was I immediately --
16 and before at the last conference, I said listen, I don't need
17 demands, I can get you every possible thing that she has and I
18 gave authorizations for the school records and I got her to
19 get her own school records, whatever she could get, and I
20 forwarded that to them.

21 I got whatever medical records, just a couple pages,
22 I'm sure there's more in Brazil, but really, I mean, she's --

23 MR. YAGERMAN: In Portuguese.

24 MR. ROTH: Well, I can only do what I can do.

25 THE COURT: Do you need to have them translated?

1 MR. ROTH: I mean, well that would be for --

2 THE COURT: Well no, it's your case, your --

3 MR. ROTH: No, no, but if they want -- they didn't
4 ask me to translate it, so I mean --

5 THE COURT: All right. I think you're responsible
6 for translations. It's your client's proof of damages, but
7 that's, you know, it still seems down the line.

8 MR. ROTH: Well at this point, I'm saying is I gave
9 them everything I possibly could at this moment.

10 There's nothing else left for the plaintiff to give
11 and the only -- and so what I was -- did not want to go
12 forward with was extra discovery, recreating the train
13 situation, you know, doing all of these other things regarding
14 the event that would not need to be done, necessarily, if
15 after you hear about their immunity, maybe they're entitled,
16 maybe they're not. And that's the part that I wanted to push
17 back.

18 THE COURT: So I'm back with the same question
19 though, which is what's the motion practice?

20 Is it a straight, pure immunity that doesn't really
21 require much information about the event and if these
22 executive level documents and testimony that you're talking --
23 I'm sorry, defendant's counsel you're talking appearing, or is
24 it you need the record of the event, so the investigation, the
25 statements, the deposition testimony of at least the five

1 people who seem to know about it --

2 MR. ROTH: Right.

3 THE COURT: -- the victim, plaintiff here, the
4 boyfriend, the two eye witnesses and the driver and plus, I
5 don't know who else, but that would be, I mean do you need
6 that? I don't know. So --

7 MR. YAGERMAN: I think that might be a good idea to
8 go with the fact discovery first, schedule another conference
9 at some point. We haven't served interrogatories yet and we
10 should get dates, you know, for --

11 THE COURT: Okay. I'm not sure I'm asking this
12 question correctly. If you step away from this, you have a
13 meta claim of immunity which is what they are saying is
14 necessary, is major capital improvements and you're -- okay.
15 And you're saying --

16 MR. YAGERMAN: Right, but they -- yes, I --

17 THE COURT: -- at an executive level, we're entitled
18 to prioritize these things and we do and here's the evidence
19 that we do and barriers didn't make it to the top of the list
20 given all the demands and the scope of the system and the
21 expense.

22 There's another view, which is your particular
23 choice with regard to barriers, needs to have a bit of
24 information about what the plaintiff is claiming happened and
25 whether a particular kind of barrier makes a difference.

1 If potentially the railings which might be, you
2 know, a relatively inexpensive fix are not practical and
3 really could never have stopped her from sliding down given
4 how she fainted. So then you need to know about what was
5 going on with the plaintiff.

6 There's another ground on which you, I think,
7 conceivably could move for summary judgment, although now
8 we're talking about this expert question, which as you say,
9 nowhere in the world, literally, is this the standard of care
10 or if it is, maybe in Japan where counsel's son was, that's a
11 completely minority view for whatever reason they prioritize
12 their system in this way, they made these choices.

13 MR. YAGERMAN: Correct.

14 THE COURT: But that might involve the expert
15 testimony. One could see this being staggered or you could
16 see doing a global summary judgment motion. And then there is
17 a question of her damages which may also require some expert,
18 seems to come at the end.

19 She has to get past all of these hurdles and be
20 going to trial, but if you're going to depose her anyway,
21 maybe you should be asking her damage. If you're going to be
22 deposing her boyfriend, ask her about damage. You know, what
23 is it motion practice wise that you see yourselves wanting to
24 do in order to have this, you know, be as efficient and
25 effective as it can be?

1 MR. YAGERMAN: I see exactly as you said, Your
2 Honor. You really articulated it perfectly. A motion, three-
3 pronged, that --

4 THE COURT: Okay.

5 MR. YAGERMAN: -- there's no duty of care, there's
6 an immunity defense, and that the barriers, whatever they
7 expose would not espouse --

8 THE COURT: Wouldn't have made a difference here.

9 MR. YAGERMAN: -- wouldn't have made a difference.

10 THE COURT: All right. So then you are talking
11 about doing all of the discovery --

12 MR. YAGERMAN: That's in the alternative --

13 THE COURT: -- in this case --

14 MR. YAGERMAN: -- because there's no duty of care to
15 have barriers, right.

16 THE COURT: Okay. All right.

17 So then it seems like you're talking about doing a
18 lot of discovery except -- and I don't usually advocate for
19 this, but given the international aspect of this case, it
20 might make sense to push this off, the damages piece of this,
21 not that you couldn't ask her about it in her deposition, but
22 I don't know for, you know, therapy post -- you know, post the
23 initial report of her, you know, physical harm, if you need to
24 get that together now before the motion practice. This is
25 really your choice.

1 MR. ROTH: Your Honor, the -- I mean my client is a
2 double amputee, it doesn't, you know, I mean, her mother comes
3 to school to open a water bottle for her. I mean, I don't
4 think that there's like there's not a complicated trying to
5 figure out what her damages are. I also think that --

6 THE COURT: Well, I mean, look in the --

7 MR. ROTH: -- as she's getting older, things are
8 going to change. So unless the defendant -- I have no
9 objection defending -- we'll bring her in, we'll bring her in
10 the summer, they can ask her anything they want. I'm not -- I
11 would not stop --

12 THE COURT: Well, I'm talking about the damages,
13 right, because you're presumably going to have to put on at a
14 minimum a -- you know, what; the docket says your demand is 20
15 million, so in order to get to 20 million you'd have to show
16 relative loss of enjoyment of life, her need for support, you
17 know, if she needs someone to help her dress or whatever it is
18 or you're suggesting there's advanced prosthetics that could
19 help her, you know, et cetera.

20 And I don't know if she's facing direct economic
21 loss. If you said she graduated from school, I don't know if
22 that means there's not going to be that much economic loss or
23 she's not able to get the highest level job in her profession
24 because her current situation, I don't know.

25 MR. ROTH: Your Honor, I would say that that should,

1 based on the posture of this case, that there's going to be
2 some event, that there's going to be all this immunity stuff.

3 I would say that that information is way, way down
4 the road and I don't -- unless the defendants are going to say
5 they're going to use something for it, I think we could wait -
6 -

7 THE COURT: Well that's the thing I'm trying to
8 figure out what --

9 MR. ROTH: -- Right. Well as far as we're concerned
10 --

11 THE COURT: -- you're doing here.

12 MR. ROTH: -- we have no issue waiting on that
13 because -- and the truth of the matter is she's young and I
14 would have to get a life care planner and do all this other
15 assessment --

16 THE COURT: Right.

17 MR. ROTH: -- but it's premature --

18 THE COURT: In Brazil though, right, I mean --

19 MR. ROTH: -- well, maybe she's going to move to New
20 York, I don't know. I mean that's what I'm saying is, I think
21 that that is one of the things that I'm saying that it should
22 be even bifurcated out at this point --

23 THE COURT: Well, I'm asking, is that what you want
24 to do?

25 MR. ROTH: Yes, I think that would be the smartest

1 thing.

2 And I don't think -- if they think they're going to
3 want a summary judgment, why would they want to waste money
4 spending all this time evaluating her and doing all this other
5 stuff and I will tell you right now, I will reproduce her
6 after we make all of this stuff, afterwards --

7 THE COURT: All right.

8 MR. ROTH: -- when she has all these claims, I will
9 reproduce her for damages if it's necessary because that's
10 only fair. So I mean --

11 THE COURT: So from the defendant's perspective, are
12 you willing to -- for discovery purposes anyway, are you
13 interested in or willing to bifurcate the plaintiff's --
14 certainly the expert discovery related to plaintiff's damages
15 and possibly the fact discovery, although I think the
16 deposition it wouldn't, you know, you could at least do some
17 of the -- I mean, all of that makes sense if you're not going
18 to have serious settlement discussions until this motion
19 practice is resolved.

20 I don't know what your position is. Obviously
21 plaintiff's number is a high number, maybe not high relative
22 to, you know, her long term difficulties, but -- so what do
23 you want to do? Do you want to have all the discovery
24 completed before you go to motion to practice?

25 MR. YAGERMAN: I would bifurcate the discovery, Your

1 Honor.

2 THE COURT: Okay. All right. So in terms of -- I
3 think you just filed a letter saying you served some kind of
4 disks, is that right? Am I mixing it up with something?
5 Anyway, you served a fair amount of discovery already, paper
6 discovery?

7 MR. YAGERMAN: Yes, Your Honor, yes we did.

8 THE COURT: All right. How much more do you see, at
9 least for the first round, do you see yourselves producing?

10 MR. YAGERMAN: I'm in the middle of --

11 THE COURT: Right. And then I'm --

12 MR. YAGERMAN: -- exploration of that, Your Honor.

13 THE COURT: All right. What was on these disks that
14 you just sent, the audio records --

15 MR. YAGERMAN: I just sent audio of --

16 THE COURT: -- communications?

17 MR. YAGERMAN: -- yeah.

18 THE COURT: Is any of this confidential? The
19 station plans? I don't have a copy. I just see the list,
20 number 4.

21 MR. YAGERMAN: I don't think so. I'd say --

22 MR. ROTH: It's public information.

23 THE COURT: I don't know what it -- I don't know.

24 MR. YAGERMAN: I think that's a public record.

25 THE COURT: Okay. All right.

1 MR. ROTH: At this point, Your Honor, you know, I've
2 looked briefly through all of their initial reports and from
3 every single -- and I don't know if this is a policy of the
4 Transit Authority, but I've -- many, many, many cases, I have
5 never seen, and I can't imagine they don't exist, when they
6 come to do the investigation, taking pictures at the scene.

7 I have a hard time believing in this incident that
8 there was no pictures contemporaneous with the scene, although
9 they did give me pictures afterwards, but that's something I
10 just want to raise now because it's -- anybody --

11 MR. YAGERMAN: I gave you what I have, counsel.

12 MR. ROTH: I --

13 MR. YAGERMAN: That's what was --

14 MR. ROTH: -- that's what the Transit Authority gave
15 to you and if you want to -- I don't think the judge wants my
16 list of sordid Transit Authority stories at this point.

17 MR. YAGERMAN: Let's deal with this case.

18 MR. ROTH: Right. Well let me just tell you
19 something, in this case do you believe that they came to the
20 scene and nobody took a picture of what happened, no blood, no
21 nothing? You do?

22 MR. YAGERMAN: I do.

23 MR. ROTH: Then that would have to be an interesting
24 policy that they have.

25 MR. YAGERMAN: It's not a policy.

1 MR. ROTH: So you think that there was big accident
2 and somebody's arm and a leg are amputated --

3 THE COURT: All right. Stop the cross talk --

4 MR. ROTH: -- and nobody took a picture --

5 THE COURT: -- I mean really --

6 MR. ROTH: Okay. Sorry, Your Honor.

7 THE COURT: -- who takes -- NYPD came to the scene,
8 right?

9 MR. YAGERMAN: Yeah, that's correct.

10 THE COURT: So maybe there's records from them. I
11 don't know. All right. So when you with Judge Pollak, you
12 set a couple of interim dates. So you're going to serve the
13 document request and interrogatories by April 6th and those
14 responses are due 5/11.

15 So in terms of depositions, at least witnesses to
16 the event, there's five that we know of plus maybe an NYPD
17 officer or an EMT or somebody. What about the high level
18 decision makers, or at least the people who --

19 MR. YAGERMAN: I have to round them --

20 THE COURT: -- involved in these --

21 MR. YAGERMAN: I have to ascertain that, Judge.

22 THE COURT: How many do you think there are?

23 MR. YAGERMAN: At this time, I don't know.

24 THE COURT: Okay.

25 MR. YAGERMAN: I really don't know. I've gotten to

1 certain levels, but I haven't gotten to --

2 THE COURT: All right.

3 MR. YAGERMAN: -- I'm still -- I'm really --

4 THE COURT: So after the document production, what
5 do you need to finish this, six months? Does that seem
6 reasonable to do this discovery?

7 MR. YAGERMAN: Which -- the document production?

8 THE COURT: Everything -- no.

9 MR. YAGERMAN: Oh.

10 THE COURT: It seems like you're looking at five to
11 10 depositions, I mean I'm guessing, ten depositions, right?
12 The plaintiff, her boyfriend, the two witnesses, the driver,
13 and then your policy people, so ten depositions, maybe?

14 MR. YAGERMAN: Well, the policy people, I probably --
15 -- I mean I have to, I mean I need some time to pull -- I mean,
16 I need some time on that, Judge.

17 THE COURT: So six months? Middle of December?

18 MR. YAGERMAN: That's fair.

19 THE COURT: It's a little bit longer. All right.
20 So let's just pick a date. December 14th fact discovery.

21 And then the expert discovery, so with -- all right.
22 I'm going to leave this as to be discussed and let's have a
23 conference over the summer and see where you are with regard
24 to figuring out what expert discovery you're going to do now.

25 MR. YAGERMAN: That's fair.

1 THE COURT: So how's August -- I don't know what
2 anyone's summer vacation plans are, et cetera, August 15th?
3 Does that look -- at 12 o'clock?

4 MR. YAGERMAN: August?

5 THE COURT: 15th?

6 MR. YAGERMAN: I might be salmon fishing in Alaska,
7 Judge.

8 THE COURT: All right. When are you leaving?

9 MR. YAGERMAN: Yeah, I think the 15th is good.

10 MR. ROTH: Could we -- could -- Your Honor would it
11 be possible, I don't know what I'm -- I'm right now in the
12 middle of waiting to hear what college my kid gets into, like
13 tonight at 7:00 we're going to find out --

14 THE COURT: Knowing on the 15th --

15 MR. ROTH: -- so I don't know what time I'll have to
16 drive him up, but --

17 THE COURT: All right. August 8th?

18 MR. ROTH: Yeah, that's probably a better --

19 THE COURT: I mean not to name out that early --

20 MR. ROTH: -- yeah, that sounds like a better date
21 actually.

22 THE COURT: All right. You're waiting for the
23 college or you're waiting for your son?

24 MR. ROTH: I'm waiting -- no, the -- 7 o'clock
25 tonight he's got to log in and find out about four colleges.

1 Tomorrow he logs in and then the college he really wants to go
2 to, he finds out on the 31st.

3 THE COURT: That's brutal.

4 MR. ROTH: It is brutal.

5 THE COURT: He needs to get the thick envelope or
6 the thin envelope.

7 MR. ROTH: Yeah -- that's it.

8 THE COURT: And you know there is no --

9 MR. YAGERMAN: That's right. I got a lot of thin --

10 THE COURT: -- is my internet connection working --

11 MR. YAGERMAN: -- envelopes. But I've been there,
12 done that.

13 THE COURT: All right. Oh my gosh.

14 MR. YAGERMAN: It's exciting though.

15 MR. ROTH: Exciting and terrifying.

16 MR. YAGERMAN: It's exciting.

17 THE COURT: All right. So we're going to have a
18 conference on August 8th at 3 o'clock.

19 MR. YAGERMAN: Great. Thank you, Judge.

20 MR. ROTH: Your Honor, as far as the defendant asked
21 for 30 days to do their initial disclosures regarding their
22 immunity defenses and I understand they don't have to produce
23 the documents, but they're going to produce something. What
24 are the --

25 THE COURT: But it's all the stuff they've already

1 given you.

2 MR. ROTH: No, no, it has nothing to do with
3 immunity. They've given me zero regarding immunity, nothing.
4 Okay.

5 And that's what they had asked -- that's what their
6 letter was for could we have 30 days to produce to do our
7 initial disclosures for immunity which, like I said, no
8 surprises and I'm always willing to offer courtesy and
9 whatever, so that's what they wanted, that's what their letter
10 was for.

11 MR. YAGERMAN: I'm still in the process, Your Honor,
12 of trying to figure out --

13 MR. ROTH: There's no objection, Judge --

14 THE COURT: Let me just understand. When you say in
15 your letter that defendants provided -- they have 22 people
16 who are likely to possess discoverable information. Is that
17 all about the event or --

18 MR. YAGERMAN: The event, Yes, Your Honor.

19 THE COURT: So why don't you just deal with this in
20 the document requested interrogatories?

21 MR. ROTH: The thing is that I would have already
22 used up, like three quarters of my interrogatories on the
23 event and they had gave me -- like all of the stuff that I
24 would have asked for, they already gave me.

25 So when they -- and they intend on doing this, so

1 all I'm saying is for the either A, let me just split my rogs
2 and I'll do -- once they do their disclosures then I can serve
3 my interrogatories after that for the --

4 THE COURT: I mean, do you agree with, I don't --

5 MR. ROTH: -- yeah, I mean I'm not, like I said,
6 because you know, until I see their disclosures regarding the
7 immunity, I don't know, I only have 25 rogs --

8 MR. YAGERMAN: What I really want to do --

9 THE COURT: What are you going to get --

10 MR. ROTH: -- I have only 25 rogs.

11 THE COURT: This is what you're going to get. The
12 assistant commissioner, whatever the person's title in charge
13 of capital investment knows about this and then you're going
14 to get the engineer who worked on station redesign, that
15 person.

16 So you're going to get the names of however many,
17 three, four, five people and you're going to get a dull
18 description of documents and then you're going to issue -- I
19 mean, it just seems like not such a productive effort.

20 MR. ROTH: And there's studies, whatever studies
21 they relied on to do whatever they're doing. So all I'm
22 saying is that --

23 THE COURT: But why don't you just issue a document
24 request that says, please provide studies about the -- I mean,
25 this is --

1 MR. ROTH: Okay.

2 THE COURT: -- there's some cases you have no idea
3 what the issue is and this case we got it, it's about
4 barriers.

5 MR. YAGERMAN: I can safely say, Your Honor, that
6 there probably were no studies relating to this particular
7 station.

8 THE COURT: What about the general question of
9 barriers? I mean, there must have been something done for the
10 L station and the Canarsie Station about whether this was
11 something worth doing, helpful --

12 MR. YAGERMAN: I think probably after the fact --

13 THE COURT: So that's more recent?

14 MR. YAGERMAN: Yeah, probably.

15 THE COURT: What are you holding up there?

16 MR. ROTH: This is platform edge doors right in
17 their document that they're considering, so I've seen --

18 MR. YAGERMAN: (Indiscernible).

19 MR. ROTH: In 2012. So don't act like oh, this is
20 this impossible thing. This is your document. So I'm not
21 trying to be crazy, Judge, but --

22 MR. YAGERMAN: it also talks about all the
23 limitations about --

24 MR. ROTH: That's fine --

25 THE COURT: All right. Stop the cross talk.

1 MR. ROTH: Okay. Anyway --

2 THE COURT: Look, this is ambitious case on the
3 plaintiffs side, so you know, you're going to have to --

4 MR. ROTH: Try my hardest.

5 THE COURT: -- try -- well, try your hardest, but
6 focus your requests. This is not a general review of all of
7 the capital decisions of the MTA or the Transit. So that in
8 an ideal world, we'd have a whole new subway system and it
9 would all be great like, you know, your models that you're
10 talking about, you know, Japan or Disney. Right?

11 So I don't know. I mean, I don't see the initial
12 disclosures being all that helpful here, but if you want, I
13 mean, to do this exercise, then you can do it.

14 MR. ROTH: Your Honor, all I'm saying is that if
15 they -- is that after they serve their initial disclosures,
16 that's when I would like to serve my rogs, that's all.

17 They said they were going to do 30 days -- 30 more
18 days for their initial disclosures and then I would serve my
19 rogs relating to those disclosures, that's all -- related to
20 immunity. That's all I was asking for.

21 THE COURT: All right. When do you want to put
22 together -- I mean, with initial disclosures on the --

23 MR. YAGERMAN: May 11th would be the time, Judge.

24 THE COURT: Okay. So then --

25 MR. YAGERMAN: Is that enough time, Denise?

1 THE COURT: Look, you can supplement them after the
2 fact, this is just --

3 MR. YAGERMAN: We can supplement --

4 THE COURT: -- to get an overview of who you think
5 you're dealing with. And then -- all right. So then for the
6 document request and interrogatories related to immunity then
7 you can serve those by the end of May.

8 MR. YAGERMAN: The interrogatories on immunity, end
9 of May?

10 MR. ROTH: Yeah. I'll serve my document requests
11 this week on the, you know --

12 MR. YAGERMAN: (Indiscernible).

13 MR. ROTH: -- yeah on the -- no, I'll serve the --
14 the document request is not the issue. That I know what to
15 ask for. Rogs is what's going to come afterwards.

16 THE COURT: I'm going to give you on the immunity
17 until the end of May to serve your initial requests. If you
18 want to serve it earlier, that's fine.

19 MR. ROTH: Sure. Okay. Thank you, Your Honor.

20 THE COURT: All right. All that aside, given the
21 uphill battle that the plaintiff has and the extensive
22 discovery that the defendant has to undergo, do you want to
23 talk about settlement? There's a lot of zeros. I mean --

24 MR. YAGERMAN: I have no authority right now, Judge.

25 THE COURT: Is your demand anything other than the

1 20 million that's listed?

2 MR. ROTH: Not at this time, Your Honor.

3 THE COURT: All right. If you think a phone
4 conference would be helpful, we could do it with me, Judge
5 Pohorelsky, court annexed mediation, obviously, private
6 mediators if you're interested in doing that. I mean one
7 thought is, is your client is going to travel to New York for
8 these depositions and --

9 MR. ROTH: Your Honor --

10 THE COURT: I mean, can she travel? I mean she
11 obviously traveled home, but --

12 MR. ROTH: She -- I mean, I've got pictures of her
13 in her wheelchair if you want to see them. She does -- she'll
14 make it. She's got to do --

15 THE COURT: I mean you all can talk about whether
16 she should do her deposition by video, if that makes sense,
17 but if she's coming, if there's any interest in having
18 settlement discussion, maybe you could coordinate those.

19 If she's here, we could get a preview of how good a
20 witness she is, et cetera, and see if this is, you know,
21 something that could be done. All right.

22 MR. YAGERMAN: So that I'm correct on the dates,
23 Judge --

24 THE COURT: Yep.

25 MR. YAGERMAN: -- we have a conference August 8th.

1 THE COURT: Um-hmm, at 3 o'clock.

2 MR. YAGERMAN: 3 o'clock. Fact discovery should be
3 done like December --

4 THE COURT: Yep, December 14th.

5 MR. YAGERMAN: All right.

6 THE COURT: And we'll have a -- and at the August
7 8th conference, we'll have a discussion about what expert --

8 MR. YAGERMAN: Discussion.

9 THE COURT: -- discovery needs to be done. And at
10 that point, hopefully, you've honed your respective theories
11 as to the immunities and standard of care, you know. That may
12 be the same expert, it may be a different experts, what you
13 may need them for this dispositive motion, you may not need
14 it.

15 I could see this going different ways, it depends on
16 what the evidence is, right? So I think it's premature to
17 make a decision about that.

18 But, at a minimum we would talk about what your time
19 line for disclosure would be and then, you know, I don't know
20 if you'll know who your experts are or not. I mean, you may
21 have somebody who you're -- who are all the experts on train
22 barriers. All right.

23 MR. YAGERMAN: You pushed out the interrogatory
24 responses, Your Honor. Did you do --

25 THE COURT: So it's bifurcated much like the

1 damages. Document requests and interrogatories can be served
2 by April 6th with responses due May 11th.

3 But for the document requests and interrogatories
4 related to immunity, they should be served by May 31st and
5 responses to follow.

6 Can I ask, this issue's been litigated in New York,
7 have there been other cases about the barrier at all?

8 MR. ROTH: It's going to be a case of first
9 impression --

10 THE COURT: First impression.

11 MR. ROTH: -- this will be my second barrier case
12 against a municipality in New York where they claimed --

13 THE COURT: What happened in the first --

14 MR. ROTH: The first -- well, this I'll tell you, my
15 two experiences. One they had a pier at Lutheran -- it's
16 called the -- they were defense on this case but here's what I
17 remember because it was a long time ago. There's a Lutheran
18 Hospital has a pier, it's called a --

19 MR. YAGERMAN: My office overlooked it.

20 MR. ROTH: Yeah.

21 THE COURT: What's it called?

22 MR. ROTH: So anyway --

23 THE COURT: The Lutheran has a pier --

24 MR. ROTH: By Lutheran Hospital there's a parking
25 lot on a pier --

1 THE COURT: Oh, yeah.

2 MR. ROTH: -- it's two tenths of a mile long, 150
3 feet wide, it's called Bat Pier 4. And that pier they said
4 that there was immunity and that they couldn't end up the
5 zoning laws it was not appropriate to put a barrier around the
6 edge of the pier.

7 And my client was 16 years old and she was learning
8 to drive on the pier because it was empty and she drove off
9 the pier.

10 And the case we went all the way to the jury and the
11 jury found that they were -- the City was responsible for not
12 putting barriers up around the pier.

13 And after my case went on, they did put Jersey
14 barriers -- a half mile of Jersey barriers around that pier
15 because there was a parking lot on the pier.

16 So if you're going to stop -- if you're going to
17 have people on a pier, and they put a little fence around it
18 to stop people falling in the water, you should put Jersey
19 barriers on a pier to stop -- parking lot to stop cars from
20 going into the water.

21 And then the other case which we had, which I told
22 you with the gap case, what happened was they said that all of
23 the courts were saying that the gap policy was six inches by
24 six inches. It's called the gun memo. And I started saying,
25 you know, that seems like a baby could fall through six inches

1 by six inches, that seems awfully big on a straight track.

2 And I started asking over and over where did you get
3 this policy from and finally it was based on this gout -- what
4 they called a study. But what gout really was, was an
5 accident investigation and the engineer said, you know what, I
6 think six by six would be pretty good, otherwise it will be
7 too expensive for us to fix it.

8 And all of a sudden they started losing their
9 immunity because all the courts said, wait a minute, that's
10 not a real study. You can't rely on that to say that that's
11 your policy.

12 THE COURT: So how did you win; on the standard of
13 care?

14 MR. ROTH: Well the standard of care was is it safe
15 or not and the jury gets to make that decision. It wasn't --
16 there's no specific standard of care said you have a track,
17 you have a track, you have train, there's a gap, is that
18 negligent or not and now they get to go to the jury, they
19 don't get thrown out on immunity.

20 So that was my personal experience and I'm not
21 saying by any means that I have an easy road to hoe here, but
22 this girl lost her arm and her leg and I'm going to fight my
23 hardest to get her justice if I can. That's all.

24 THE COURT: All right. Your thoughts? Anything
25 else?

1 MR. YAGERMAN: No, Your Honor. I think you covered
2 a lot of ground.

3 THE COURT: Okay. All right.

4 MR. YAGERMAN: And it was a pleasure meeting you,
5 introduce you with this interesting matter.

6 THE COURT: All right. So we can go off the record,
7 but I'm going to ask you to stay for one second.

8

9 (Proceedings concluded at 5:23 p.m.)

10 I, CHRISTINE FIORE, Certified Electronic Court
11 Reporter and Transcriber and court-approved transcriber,
12 certify that the foregoing is a correct transcript from the
13 official electronic sound recording of the proceedings in the
14 above-entitled matter.

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June 3, 2018

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Christine Fiore, CERT

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